United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7299

To be argued by
CYRIL HYMAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7299

MISS MAE M. SMITH (a k a: Miss Mary M. Smith),
Appellant,

—against—

FREDERICK V. BEHRENDS, F.B.I. Agent; OSCAR G. RUBIN, Esq., MRS. DELIA CRAVEN SMITH, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR FEDERAL APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
CYRIL HYMAN,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR FEDERAL APPELLEE

Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Costantino, *J.*) in favor of Frederick V. Behrends, an Agent of the Federal Bureau of Investigation, sued herein as Fred Barons, dismissing appellant's complaint (seeking damages for an alleged slander) with prejudice as to the federal and non-federal appellees, on the grounds that the appellant's complaint violates Rule 8(e)(1) of the Federal Rules of Civil Procedure because it contained confusing and incredible allegations (59-a)* and that defendants should not be subjected to the expense

* Numerals followed by lower case "a" refer to Appendix of Appellee.

of defending allegations which violate Rule 8(e)(1) of the Federal Rules of Civil Procedure. (60-a).* In addition, upon the further motion of federal appellee for summary judgment, the district court granted the federal appellee judgment dismissing the complaint.

Statement of the Case

Appellant, *pro se*, filed in the Court below a 39 page amended complaint naming some 39 parties (6-a to 45-a), and seeking the sum of $500,000.00 plus legal costs (7-a) because of statements made by the federal appellee to the appellant's then psychiatrist, appellee, Dr. Chartock. The federal appellee had been previously authorized by the appellant to speak to her psychiatrist. (58-a). Appellant's original complaint was dismissed by the district court pursuant to Rule 8(e)(1), Fed. R. Civ. P., because it violated the mandate that each averment of a pleading shall be simple, concise and direct and the appellant was given leave to file an amended complaint within 60 days of its dismissal (2-a). Since the amended complaint was also ambiguous, indefinite and confusing, the federal appellee supplied to the district court certain facts contained in FBI files that are related to the allegations contained in the complaint pertaining to the federal appellee. (52-a). Simultaneously, the federal appellee moved that the complaint be dismissed pursuant to Rule 8(a), Rule 12, or in the alternative, for summary judgment pursuant to Rule 56 of the Fed. R. Civ. P.

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* We concur in the co-appellees' arguments concerning the validity of the complaint under Rule 8(e)(1) of the Fed. R. Civ. P. However, since the District Court granted the federal appellee's motion for summary judgment on the complaint as is, we shall not brief the Rule 8 issue herein.

The records of the Federal Bureau of Investigation revealed that the FBI received a complaint in November of 1973 from Mr. Thomas Haythe, an attorney representing Englehard Hanovia Industrial Company, that two employees of the company received threatening letters in the mail (3-a to 5-a). An official FBI investigation was commenced and on January 3, 1974 the appellant was interviewed by the federal appellee. The appellant admitted that she had written several thousand letters to various individuals who she feels are persecuting her but she denied writing the letters in question. (Exhibit 10).*

After further investigation by the FBI, the facts of the case under investigation were presented to the United States Attorney for the Eastern District of New York and prosecution of appellant for extortion was declined. (Exhibit 7).

During the course of an oral interview by the federal appellee at the office of the FBI in New York City in January, 1974, the appellant stated that her mother has told people that the appellant is a "black person who passes herself off as a caucasian" and that she "had a baby born out of wedlock". (Exhibit 10) In addition, appellant's amended complaint alleges that during the course of this same interview the federal appellee "stared at the stomach of the Plaintiff." (23-a).

Subsequently, by letter dated May 15, 1975, and received by the FBI (57-a), appellee, Dr. Chartock, appellant's psychiatrist, requested information about the FBI's investigation of his patient. Attached to the letter

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* Exhibits are attached to Appellant's Appendix and are unnumbered. Numbered pages were assigned to the Exhibits by the federal appellee.

from Dr. Chartock was a signed authorization form of the appellant (58-a) authorizing the federal appellee to "furnish Dr. H. Chartock with all the information you may have on me about my contacts with you."

In response to appellant's authorization, the federal appellee telephonically advised Dr. Chartock that appellant had been a subject of an FBI investigation and that the United States Attorney's office had declined prosecution. The FBI agent did not furnish any other information to Dr. Chartock. (56-a).

ARGUMENT

POINT I

The District Court did not commit error in granting the federal appellee's motion for summary judgment.

Appellant did not challenge the validity of the FBI investigation reports * that were presented to the district court nor did she contest the facts set forth in the appellee's 9(g) statement of material facts not in dispute ** filed with the district court. (55-a).

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* As to the record's admissibility see: Rule 803(8) of the Federal Rules of Evidence.

** Appellant did not file a cross-statement contesting the federal appellee's 9-G Statement as required by Rule 9(g) of the General Rules of the Court containing a short and concise statement of the material facts as to which she contended that there exists a genuine issue to be tried, and all material facts set forth in the federal appellee's 9(g) statement were deemed admitted under the local rule because appellant did not controvert this statement which she was required to do under this rule.

Rule 56(e) of the Federal Rules of Civil Procedure provides that a plaintiff, in order to establish that there was a "genuine issue" as to material fact,

> "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." See *Waldron* v. *Cities Service Co.*, 361 F.2d 671 (2d Cir. 1966), aff'd *sub nom First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968).

Here, the evidence clearly establishes that the FBI Agent was investigating alleged criminal activity and that the release of certain information by the FBI, pursuant to the appellant's authorization to the appellant's physician-psychiatrist, was within the outer perimeter of the agent's official line of duty. *Barr* v. *Matteo*, 360 U.S. 564 (1959). The federal appellee made an initial record in the district court that he was acting at all times within the scope of his official employment and that his actions would not give rise to a suit against the United States by reason of the provisions contained in Title 28 U.S.C. § 2680(h). This provision states that:

> "Any claim arising out of . . . libel, slander . . ."

is exempted from the provisions of the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

Since the individual federal appellee was officially acting on behalf of the United States, his actions should be afforded the same immunity from suit available to the sovereign under 28 U.S.C. § 2680(h). *Benjamin* v.

Ribicoff, 205 F. Supp. 532 (D.C. Mass. 1962); *Broome* v. *Simon*, 255 F. Supp. 434 (W.D. La. 1965). See also *Blitz* v. *Boog*, 328 F.2d 596 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964); *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

As to any individual liability of the federal appellee, the undisputed material facts unequivocally establish that he acted in good faith with reasonable grounds for his action, as argued in Point II below.

POINT II

Federal appellee acted in good faith with reasonable grounds for his action and enjoyed a qualified immunity.

The federal appellee submits that he is entitled to an affirmance of the district court's order dismissing the complaint because of the indisputable good faith and reasonable grounds underlying his action.*

First, it should be observed that the FBI Agent was authorized to conduct a cr[illegible]nal investigation which concerned the threatening letters. (3a-5a). The information supplied to the FBI was information supplied to the government by the appellant.

The Supreme Court's recent decisions concerning the "qualified immunity" doctrine have not sought to define the parameters of his "qualified immunity" beyond assert-

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* Although not specifically discussed by the District Court in its opinion, the undisputed facts in the record establish that the federal appellee is personally immune from any suit by appellant as set forth herein.

ing that such immunity exists wherever there is a "good faith" belief in the conduct which is supported by "reasonable grounds for the belief formed at the time and in light of all the circumstances. . . ." *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974); *Wood* v. *Strickland*, 420 U.S. 308 (1975).

In the instant case, the FBI records which were before the Court establish beyond any doubt that the agent had a good faith belief in the validity of his actions and that, indeed, his actions were entirely legitimate and reasonable under the circumstances.

There can be no question that the federal appellee had a good faith basis in interviewing the appellant concerning the alleged threatening letters and the records also establish his good faith with respect to the conversation had with the appellant's physician-psychiatrist. This conversation was had only after the appellant authorized it and was conducted without any malice. Under the circumstances, it would be frivolous to assert that there was any bad faith on the part of the federal appellee in this matter.

As to the qualified immunity of federal appellee, this Court should affirm the district court's order granting summary judgment in his favor because the governmental record "set[s] forth undisputed facts demonstrating the reasonableness of [his] action." *Economou* v. *United States Department of Agriculture, et al.*, 535 F.2d 688, 696 (2d Cir. 1976).

The federal appellee has demonstrated to the district court that "there is no genuine issue as to any material facts." 56 Fed. R. Civ. P. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Cali* v. *Eastern Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971).

In *United States of America* v. *Pent-R-Books, Inc.*, — F.2d — (2d Cir. 1976), Slip Opinion Nos. 74-2281, 75-6014, 75-6032, decided June 28, 1976, this Court stated:

> "If, however, the moving party does carry its preliminary burden, then, the opposing party may not defeat the motion by relying on the contentions of its pleading. Rather, it must produce 'significant probative evidence tending to support [its position].' *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968). See *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975)." at 4481. See also *Donnelly* v. *Guion*, 467 F.2d 290, 293 (2d Cir. 1972); *Economou* v. *United States Department of Agriculture, et al.*, 535 F.2d 688, 696-697 (2d Cir. 1976).

Here the federal appellee demonstrated to the court, by official government records, that there was no actionable wrong committed by him and that his action was reasonable under the circumstances and his duty was performed in good faith. *Economou* v. *United States Department of Agriculture, supra.* Appellant failed to respond with specific facts showing that there was a genuine issue for trial relating to the federal appellee's good faith or the existence of reasonable grounds for his action. Under such circumstances, summary judgment dismissing the complaint was appropriate. Rule 56(e), F.R. Civ. P.

If there has been any bad faith in this entire matter, it is the bad faith on the part of the plaintiff-appellant in commencing this action, after she had consented to the disclosures in question. Here, the act of the appellant by signing the authorization allowed the FBI Agent to convey information to her physician-psychiatrist, causing the information to be published. Where a plaintiff causes the information to become public, there is no pub-

lication of a libel and she cannot complain of injuries caused by her own act in making the libel public. *Shepard* v. *Lamphier*, 146 N.Y.S. 745 (Sup. Ct. Erie Cty. 1914); *Galligan* v. *Kelly*, 31 N.Y.S. 561 (Sup. Ct. N.Y. Cty. 1894); see also *Shapiro* v. *Health Insurance Plan of Greater New York*, 194 N.Y.S. 2d 509 (1959); *Smith* v. *DiCara*, 346 N.Y.S. 2d 546 (App. Div. 2d Dept. 1973). Thus, all question of immunity aside, as a matter of law, the undisputed facts demonstrate that the appellant has no cause of action ~~against~~ against the federal appellee.

CONCLUSION

The district court's order granting the federal appellee summary judgment dismissing the complaint should be affirmed.

Dated: Brooklyn, New York
October 7, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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* The United States Attorney's Office wishes to acknowledge the assistance of Karen Sclafani in the preparation of this brief. Ms. Sclafani is a third year law student of New York University School of Law.

UNITED STATES COURT OF APPEALS
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-against-

FREDERICK V. BEHRENDS, FBI AGENT;
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et al.,

Appellees.

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STATE OF NEW YORK
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EVELYN COHEN, being duly sworn, says that on the 7th day of October 1976, I deposited in Mail Chute for mailing, in the United States Courthouse, located at 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, BRIEF AND APPENDIX OF FEDERAL APPELLEE on behalf of Federal Appellee, Frederick V. Behrends, of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the persons hereinafter named, at the places and addresses stated below:

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Sworn to before me this
7th day of Oct. 1976.
Martha Scharf

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Qualified in Kings County
Commission Expires March 30, 1977